

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SASAN MIRKARIMI, individually and on behalf of all others similarly situated,

Plaintiff.

V.

NEVADA PROPERTY 1 LLC, a  
Delaware limited liability company  
d/b/a THE COSMOPOLITAN  
HOTEL OF LAS VEGAS, and DOES  
1-50, inclusive.

## Defendants.

Case No. 12cv2160-BTM-DHB

**ORDER DENYING  
DEFENDANT'S MOTION TO  
DISMISS AND DENYING  
DEFENDANT'S MOTION TO  
STRIKE CLASS  
ALLEGATIONS**

On October 9, 2012, Defendant Nevada Property 1 LLC, d/b/a The Cosmopolitan Hotel of Las Vegas (“The Cosmopolitan” or “Defendant”), filed a motion to dismiss Plaintiff’s First Amended Complaint (“FAC”), or in the alternative, to strike the class allegations. (ECF No. 15.) For the reasons below, Defendant’s motions are hereby **DENIED**. Defendant also filed an earlier motion to dismiss on September 7, 2012, prior to Plaintiff filing his FAC (ECF No. 7), which is **DENIED** as moot.

## I. BACKGROUND

On September 25, 2012, Plaintiff Sasan Mirkarimi (“Plaintiff”) filed the FAC against The Cosmopolitan and DOE defendants, on behalf of himself and all others similarly situated. Plaintiff resides in San Diego County, while Defendant owns and

1 operates The Cosmopolitan Hotel in Las Vegas. (FAC ¶¶ 2-3.) Originally filed in state  
2 court, Defendant removed the action to federal court on August 31, 2012, in  
3 accordance with the Class Action Fairness Act of 2005.

4 Plaintiff alleges that during the twelve months preceding the complaint,  
5 Defendant recorded telephone communications between the Plaintiff and Defendant.  
6 (FAC ¶ 5.) Plaintiff alleges that Defendant did not notify Plaintiff that the  
7 conversations were being recorded. (FAC ¶ 6.) During the conversations at issue,  
8 Plaintiff alleges he disclosed personal information, including his credit card number,  
9 security code, and expiration date, as well as his billing address. (FAC ¶ 5.)

10 Plaintiff's FAC asserts that Defendant's actions violated California Penal Code  
11 § 630 *et seq.*, also known as the California Invasion of Privacy Act ("CIPA"). Plaintiff  
12 seeks statutory damages, injunctive relief, and attorneys' fees.

13

## 14 **II. LEGAL STANDARD**

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be  
16 granted only where a plaintiff's complaint lacks a "cognizable legal theory" or  
17 sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept.,  
18 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the  
19 allegations of material fact in plaintiff's complaint are taken as true and construed in  
20 the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51  
21 F.3d 1480, 1484 (9th Cir. 1995).

22 Although detailed factual allegations are not required, factual allegations "must  
23 be enough to raise a right to relief above the speculative level." Bell Atlantic v.  
24 Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove the 'grounds'  
25 of his 'entitle[ment] to relief' requires more than labels and conclusions, and a  
26 formulaic recitation of the elements of a cause of action will not do." Id. "[W]here the  
27 well-pleaded facts do not permit the court to infer more than the mere possibility of  
28 misconduct, the complaint has alleged—but it has not show[n]—that the pleader is

1 entitled to relief.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (internal quotation  
2 marks omitted).

3

4 **III. DISCUSSION**

5 Defendant moves to dismiss Plaintiff’s FAC on the grounds that Plaintiff did not  
6 have an “objectively reasonable expectation” that his conversations would not be  
7 recorded. In the alternative, Defendant moves to strike the class allegations on the  
8 grounds that: (1) the statutory damages the class members seek require individualized  
9 determinations of fact which defeat the possibility of class certification; and (2) the  
10 class lacks superiority.

11

12 **A. Motion to Dismiss**

13 Under CIPA, a party may be held liable “who, intentionally and without the  
14 consent of all parties to a confidential communication, by means of any electronic  
15 amplifying or recording device, eavesdrops upon or records the confidential  
16 communication . . . .” Cal. Penal Code § 632(a). A “confidential communication”  
17 includes “any communication carried on in circumstances as may reasonably indicate  
18 that any party to the communication desires it to be confined to the parties thereto . .  
19 . . . .” Cal. Penal Code § 632(c). CIPA excludes, however, “any other circumstance in  
20 which the parties to the communication may reasonably expect that the communication  
21 may be overheard or recorded.” Id.

22 The California Supreme Court has held that “a conversation is confidential under  
23 section 632 if a party to that conversation has an *objectively reasonable expectation*  
24 that the conversation is not being overheard or recorded.” Flanagan v. Flanagan, 27  
25 Cal. 4th 766, 777 (2002) (emphasis added). Furthermore, confidentiality requires  
26 “nothing more than the existence of a reasonable expectation by one of the parties that  
27 no one is listening in or overhearing the conversation.” Flanagan, 27 Cal. 4th at 772-73  
28 (citing Frio v. Superior Court, 2003 Cal. App. 3d 1480, 1488 (1988)) (internal

1 || quotations omitted).

2 Defendant argues that Plaintiff fails to allege an objectively reasonable  
3 expectation that his conversations with Defendant were “confidential communications”  
4 that would not be overheard or recorded. Because billing information would have to  
5 be shared with other employees, Defendant contends that the nature of the conversation  
6 was such that the Plaintiff could not have reasonably expected it to be confidential.

7       In Flanagan, the California Supreme Court settled an appellate court split over  
8 whether a party’s understanding of “confidential communication” required either an  
9 additional belief that the information would not be divulged at a later time to third  
10 parties, or merely the expectation that the conversation was not being simultaneously  
11 disseminated to an unannounced second observer. See O’Laskey v. Sortino, 224 Cal.  
12 App. 3d 241 (1990); Frio, 2003 Cal. App. 3d 1480. The court noted the Legislature’s  
13 concern with protecting *all* conversations from eavesdropping, not just those where a  
14 party wanted to keep the content secret. Flanagan, 27 Cal. 4th at 776. Therefore, the  
15 court adopted the Frio interpretation of “confidential communication,” holding that  
16 CIPA prohibited the nonconsensual recording of conversations *regardless* of the  
17 content of the conversation or any expectation that the conversation may later be  
18 conveyed to a third party. *Id.* at 775-76.<sup>1</sup>

19 Defendant’s argument regarding the nature of the conversation being one which  
20 necessitates sharing to third parties fails to align with the California Supreme Court’s  
21 interpretation of the law. As the Flanagan court stated, confidentiality under CIPA  
22 extends to a conversation regardless of whether information will be shared to a third  
23 party. Thus, regardless of the fact that credit card information needs to be shared  
24 among employees, so long as Plaintiff can demonstrate an objectively reasonable  
25 expectation that his conversation was not being overheard, he has a proper claim under

1 CIPA.

2 Defendant next argues that the legislative history and prior court decisions  
3 exempt the type of conversation at issue from CIPA because it was the type of service-  
4 observing practice the Legislature deemed to be in the public's best interest. See Sajfr  
5 v. BBG Commc'ns, Inc., 2012 WL 398991, at \*6 (S.D. Cal. Jan. 10, 2012) (noting that  
6 service-observing is permissible as an exemption from § 632 of CIPA). However, the  
7 statutory language seems to specify that only "public utilit[ies] engaged in the business  
8 of providing communications services and facilities" are exempted from CIPA. Cal.  
9 Penal Code § 632(e).<sup>2</sup> Whether the "service observing" exception applies involves a  
10 factual determination that Defendant was in fact engaged in such conduct in this case.  
11 If the recording was "service observing," then the Court will have to determine whether  
12 such a recording is exempted from section 632. See, e.g., Knight v. CashCall Inc., 200  
13 Cal. App. 4th 1377, 1395 (2011) (noting that the "service observing" exception did not  
14 apply to a finance company). Resolution of this issue on the bare record before the  
15 Court would be premature.

16 Furthermore, the Ninth Circuit recently noted that, if adequately pled, a caller  
17 asked to disclose private or potentially private information could have an objectively  
18 reasonable expectation that the conversation is confidential. Faulkner v. ADT Sec.  
19 Servs., Inc., 706 F.3d 1017, 1020 n.2 (9th Cir. 2013). Although the court in Faulkner  
20 ultimately affirmed the district court's order granting defendant's motion to dismiss,  
21 the plaintiff in that case never alleged disclosure of private information. Rather, the  
22 Ninth Circuit determined that the plaintiff's claim lacked the necessary details  
23 regarding the nature of the parties and the circumstances of the call. Id. The Plaintiff  
24 in this case, however, alleges that he shared his credit card number, expiration date,  
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26 <sup>2</sup> Cal. Penal Code § 632(e) reads in full: "This section does not apply (1) to any public utility  
27 engaged in the business of providing communications services and facilities, or to the officers,  
28 employees, or agents thereof, where the acts otherwise prohibited by this section are for the purpose  
of construction, maintenance, conduct or operation of the services and facilities of the public utility,  
or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the  
tariffs of a public utility, or (3) to any telephonic communication system used for communication  
exclusively within a state, county, city and county, or city correctional facility."

1 billing address, and security code. Certainly this qualifies as potential private  
2 information.

3 Finally, “[w]hether the Plaintiff has an objectively reasonable expectation is  
4 generally a question of fact.” Knight, 200 Cal. App. 4th at 1396. See also Vera v.  
5 O’Keefe, No. 10CV1422, 2012 WL 3263930, at \*4 (S.D. Cal. Aug. 9, 2012) (noting  
6 that a plaintiff’s reasonable expectation of privacy is a question of fact for the jury to  
7 decide). Given that Plaintiff alleges disclosure of private information and that a  
8 determination regarding Plaintiff’s reasonable expectation is arguably a question of  
9 fact, the Court **DENIES** Defendant’s motion to dismiss for failure to state a claim.

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11 B. Motion to Strike Class

12 Alternatively, Defendant moves to strike the class allegations from the FAC.  
13 Dismissal of a class at the pleading stage is rare because “the class determination  
14 generally involves considerations that are enmeshed in the factual and legal issues  
15 comprising the plaintiff’s cause of action.” Gen. Tel. Co. Of the Sw. v. Falcon, 457  
16 U.S. 147, 160 (1982) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978))  
17 (internal quotations omitted). Whether or not discovery is warranted for a class to  
18 proceed to class certification is within the sound discretion of the court. Kamm v.  
19 California City Dev. Co., 509 F.2d 205, 209 (9th Cir. 1975).

20 Defendant argues that, in order to determine whether each class member had a  
21 reasonable expectation of confidentiality, each caller’s conversation must be analyzed  
22 individually. However, the Court declines to adjudicate class certification issues at this  
23 stage. Rather, this matter is proper after appropriate time for briefing and discovery has  
24 occurred. See generally Brazil v. Dell Inc., 2008 WL 4912050, at \*4 (N.D. Cal. 2008)  
25 (refusing to adjudicate on the issue of class certification before it had been briefed);  
26 7AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil §  
27 1785.3 (3d ed. 2013) (noting that the court’s determination on class certification should  
28 rely on more information than simply the complaint). Therefore, the Court **DENIES**

1 Defendant's motion to strike Plaintiff's class allegations.  
2

3 **III. CONCLUSION**

4 For the reasons discussed above, Defendant's motion to dismiss is **DENIED**.  
5 Defendant's motion to strike class action allegations is **DENIED** without prejudice.  
6 As stated previously, Defendant's motion to dismiss filed September 7, 2012, is  
7 **DENIED** as moot. Defendant has twenty (20) days from the filing of this order to  
8 answer Plaintiff's FAC.

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10 **IT IS SO ORDERED.**

11 DATED: July 15, 2013

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13 BARRY TED MOSKOWITZ, Chief Judge  
14 United States District Court  
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